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IN THE

Supreme Court of the United States

October Term 1959

No. 249

MELVIN TANZER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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To The Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Comes now Melvin Tanzer and petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit, and in respect thereto respectfully sets forth as follows:

Opinion and Judgment of Lower Court.

The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, Cause No. 16,425, was rendered and entered on April 13, 1960, a copy of which is appended hereto.

By said Opinion and Judgment the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the District of Arizona denying two motions:

1. A Motion in Cause No. C-13662-Tucson, to set aside the judgment of conviction in that case rendered January 20, 1953, and to discharge all proceedings against defendant Tanzer in said case; and

2. A Motion in Cause No. C-17345-Tucson, to set aside the sentence of ten years' imprisonment imposed on defendant in said last numbered case on March 11, 1957 as an alleged second offender for violation of Title 21, U. S. C. A., Section 173.

Certified copies of the Transcript of Record and the Supplemental Transcript of Record of the proceedings in the United States Court of Appeals for the Ninth Circuit under Rule 21 of the Revised Rules of the Supreme Court of the United States were duly filed with the Clerk of this Court.

Petition for Rehearing in the Lower Court.

A Petition for Leave to File Petition for Rehearing out of Time was filed in the United States Circuit Court of Appeals for the Ninth Circuit on the 18th day of May, 1960.

Thereupon the Court, on the 20th day of May, 1960, entered its order granting leave to file Petition for Rehearing.

Petition for Rehearing was duly filed in said Court, and said Court subsequently denied said Petition for Rehearing on the 31st day of May, 1960.

Order Granting Extension of Time for Filing Petition for Writ of Certiorari.

Application for extension of time within which to file petition for writ of certiorari was duly filed on June 9, 1960, and which was within thirty days of the Opinion, Judgment and final orders of the United States Court of Appeals for the Ninth Circuit.

An order was duly made on June 9, 1960 by Mr. Justice William O. Douglas, Associate Justice of the Supreme Court of the United States, extending the time for the filing of this petition for writ of certiorari to and including July 30, 1960, pursuant to Rule 37 of Federal Rules of Criminal Procedure, 18 U. S. C., and United States Supreme Court Rules 22 and 23.

Statutory Provisions Invoking Jurisdiction of This Court.

Jurisdiction of the United States Supreme Court.

The jurisdiction of this Court is invoked in this cause under Title 28, U. S. C., Section 1254, and by virtue of which the Supreme Court may review cases in the courts of appeal by the granting of writs of certiorari.

Questions Presented.

There are three questions presented for review:

1. When a court *suspends* the imposition of sentence, and the defendant is placed on probation, and the defendant successfully completes the terms of probation without incident, is the defendant entitled to an order expunging the record in that particular case and the discharge of all proceedings against him in said case?

It is the contention of the Petitioner that under the provisions of 18 U. S. C., Section 3651 providing that "de-

fendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation," that Petitioner is entitled to a discharge of all the proceedings against him and an expunging of the record when he has satisfactorily complied with all the terms and conditions of the probation, and that therefore, he would no longer have a record against him as to Cause No. C-13062.

2. Since the imposition of sentence was suspended and only a probation order entered in Cause No. C-13062, all of which happened in the year 1953, is there such *finality of judgment* as to make the Petitioner a second offender in Cause No. C-17345, and within the meaning of Section 7237 of Title 26, U. S. C. A., the enhanced punishment statute?

As to question No. 2, it is Petitioner's contention that the suspension of the imposition of sentence in Cause No. C-13062 in 1953, does not possess the characteristics of that finality of judgment which is required to make him susceptible to the application of the second and subsequent offender statute. *Petitioner makes a distinction* between *the suspension of the imposition of sentence* and the *suspension of the execution of sentence*, and represents that if merely the execution of sentence had been suspended, he would then be subject to the penalties of the enhanced punishment statute.

Petitioner further contends that since the *imposition of sentence was suspended*, that there was *no finality of judgment*, and that, therefore, as to the enhanced punishment statute, there was, as to him, no prior conviction.

Petitioner further contends in this respect that though the distinction may be very fine, that because of the

rigors and severity of the second offender statute, he is entitled to every consideration and protection, even though the instruments of protection be of a very highly technical nature. In this respect Petitioner further contends that Congress could not have intended to, and did not intend to punish the user of narcotics and the trafficker in narcotics with the same degree of severity; that since Petitioner who was merely a user of narcotics could not have the benefit of immediate clarification of legislation, he is entitled to every legal protection possible to prevent application as to him of the second and subsequent offender statute.

3. Is there a denial of due process, and is there a denial of petitioner's rights as guaranteed to him under Amendments Five and Eight of the United States Constitution (see Appendix A) under the circumstances of this case, because to deprive Petitioner of the rights of parole and probation as would be done under Section 7237, Title 26, U. S. C. A., would be, as to him, cruel and unusual punishment.

In connection with question No. 3, Petitioner contends that while the exact phraseology of Section 7237, Title 26, U. S. C. A., might not allow for a difference, yet the *Congressional Report* clearly indicates that the Congress intended to place traffickers in narcotics in a different category from users of narcotics. *Use of narcotics* is within the common knowledge of all considered that the user *is a sick individual*; a trafficker in narcotics is considered within the common knowledge of all to be guilty of a horrendous crime. (See United States Code Congressional and Administrative News; 84th Cong., 2d Sess., 1956, Vol. 2, p. 3281.) Therefore, the acts of legislation could not have been intended to fall with equal severity on

two such different individuals guilty of two such different offenses. To impose on the Petitioner in this case, who at one time was a user of narcotics, the same degree of punishment as on the worst creature in society, namely, a trafficker in narcotics, would be as to this Petitioner certainly without due process of law, and cruel and unusual punishment.

Constitutional Provisions and Statutes.

Title 21, United States Code, Section 173 (see Appendix A):

> "It is unlawful to import or bring any narcotic drug into the United States. . . ."

Title 18, United States Code, Section 3231 (see Appendix A):

> "The District Courts of the United States shall have original jurisdiction, exclusive of the Courts of the States, of all offenses against the laws of the United States."

Title 28, United States Code, Section 1291 (see Appendix A):

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28, United States Code, Section 1294 (see Appendix A):

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of

appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit embracing the district. . . ."

Title 26, United States Code, Section 7237 (see Appendix A):

Penalties applicable to certain taxes.

"(b) Sale or other transfer without written order. —Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. . . ."

"(c) Conviction of second or subsequent offense. (1) Prior offenses counted. For purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), and the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in—

(A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U. S. C., sec. 174): . . .

(2) Procedure after conviction . . . the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense . . . if he acknowledges that he is such person, he shall be sentenced as prescribed in subsection (a)

or (b) of this section, subsection (c) or (h) of such section 2, or such Act of July 11, 1941, as amended, as the case may be.

"(d) No suspension of sentence; no probation; etc.—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply."

Statement of Case.

Petitioner was not a trafficker in narcotics. For this reason the District Court did not wish to impose a ten year prison sentence on petitioner, and had so expressed itself, but erroneously believed that there was a final judgment of conviction in the 1953 Cause No. C-13662, District Court of Arizona; and that he therefore had to apply the second and subsequent offender statute to petitioner. Petitioner contends that he was not a second offender of the narcotics laws of the United States within the meaning of Title 26, U. S. C. A., Section 7237, or at all, for the following reasons:

(1) In Cause No. C-13662 petitioner fully complied with all terms and conditions of the probation order

and satisfactorily completed his probation period. Thereupon, he was no longer subject to any punishment and the *District Court had no jurisdiction over him. He*, therefore, *was entitled* to have the *proceedings* in said case *discharged* and the *record* in said case *expunged*. He would then be a *first offender in connection with the application of the enhanced punishment statute*. Therefore, when Petitioner requested, before commitment in Cause No. C-17345, that the record in Cause No. C-13662 be expunged, he was automatically entitled to such relief. (2) The ten year prison *sentence* imposed on Petitioner on March 11, 1957 in Cause No. C-17345, not subject to probation or parole, *was illegal* because there was *no final judgment of conviction* in *Cause No. C-13662*, in that the District Court suspended the imposition of sentence and placed Petitioner on probation. *This was not a final order of conviction* within the second and subsequent offense statute, to-wit: Title 26 U. S. C. A., Sec. 7237.

The said ten year prison sentence was further illegal, in this, that since Petitioner was entitled to have the record in Cause No. C-13662 expunged by reason of his satisfactory completion of the probation period, *there was no prior record of conviction* against Petitioner and *he was not subject to enhanced punishment as a second offender*. If the said sentence so imposed in Cause No. C-17345 is not set aside, then, as to this Petitioner, a ten year term in the penitentiary without rights of probation or parole is without due process of law and is cruel and unusual punishment.

Reasons Relied on for Granting of the Writ of Certiorari.

1. The Writ of Certiorari should be granted and the judgment below should be reversed, vacated and remanded because the United States Court of Appeals has decided important questions of criminal law contrary to the general decision of the courts.

2. This Court should grant certiorari to decide important questions of procedural law.

3. This Court should grant certiorari in its supervisory capacity in Federal criminal cases.

4. This Court should grant certiorari so that there may be uniform interpretation of the statutes by the Appellate Courts.

5. Basically, writ of certiorari should be granted and the judgment should be reversed, vacated and the petitioner remanded for sentence as a first offender, and in accordance with the express intention of the United States District Court of Tucson, Arizona, because

(a) in a criminal case when imposition of sentence is suspended and defendant put on probation, and defendant satisfactorily complies with the terms and conditions of the probation order, he is no longer subject to punishment and no longer subject to the jurisdiction of the Court, and he is entitled to have the proceedings against him discharged, and the record expunged; and

(b) *because there was no finality of judgment in Cause No. C-13062, 1953, sentence as a second offender in Cause No. C-17315 would,* as to this petitioner, be *depriving him of due process of law* and be *cruel* and *unusual punishment*, and in violation of the Constitution of the United States of America.

Arguments Relied on for Granting Writ of Certiorari.

In a criminal case when imposition of sentence is suspended, and defendant is put on probation, and defendant satisfactorily complies with the terms and conditions of the probation order, he is no longer subject to punishment and no longer subject to the jurisdiction of the Court, and he is entitled to have the proceedings against him discharged and the record expunged.

Petitioner fulfilled and complied with every term and condition of the probation order. Since his first brush with the narcotics laws in 1952 he has been and now is out on bond. He was and is steadily employed, supporting a wife and other worthy members of his family. He has at all times conducted and is conducting himself as a worthy and law-abiding citizen.

Petitioner contends that by complying with all the terms and conditions of the probation order that he became entitled to have all the proceedings against him in said case No. C-13662 discharged and the record thereof expunged.

United States v. Maisel, 26 F. 2d 275 (D. C., S. D. of Tex. at Houston).

In the above-cited case the Court is of the opinion that the entire purpose of the Federal probation statutes is to rehabilitate the offender and that when the offender, who has been put on probation, has conducted himself as a law-abiding citizen and has fully carried out the probation order he is entitled to face society again without a record of criminality against him. For that reason the Court in that case discharged all of the proceedings when the defendant had satisfactorily complied with the terms of the probation order.

At page 276:

> "When the period of probation ends favorably there remains nothing of the procedure, not even the record of the offense committed. . . ."

Following the procedure of the above-cited case by expunging the record in Cause No. C-13662, upon Petitioner's request as set out in his amended motion, would be consistent with all humanitarian principles and social justice.

The District Court itself does not desire to impose a ten year sentence on this Petitioner in Cause No. C-17345. In view of this, the expunging of the record and the discharging of all the proceedings against him in Cause No. C-13662 loom even greater in importance than otherwise.

The District Court is convinced that Petitioner is not a trafficker in narcotics and feels, therefore, that this Petitioner should not be subjected to the harshness and extreme rigors of the second and subsequent offender statute.

By Section 7237, U. S. C. A., Title 26, Petitioner is not only subject to enhanced punishment, but is not entitled to probation or parole. Because of these extreme penalties the *second and subsequent offender statute* is *construed most strictly in favor of a defendant in a criminal case.*

> Wharton's Criminal Law & Procedure, Vol. 5, Sec. 2218, p. 436.

Petitioner, then, in accordance with all principles of true American justice, should be given every advantage so that the harshness of the said enhanced punishment statute should not fall upon him, if at all possible.

If the proceedings in Cause No. C-13662 were discharged and the record expunged, to all of which Petitioner is rightfully entitled, he would not be subjected to the harsh penalties and deprivations under the said second and subsequent offender statute.

When Petitioner had successfully complied with all the terms and conditions of the probation order and the probation period in Case No. C-13662 expired, the District Court no longer had power or jurisdiction over Petitioner, and Petitioner's liability to punishment of any kind or character ceased. This is in accord with Section 3651, U. S. C. A., Title 18, which reads:

> *"The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation."*

Automatically by the application of said provision *Petitioner was entitled* to have the proceedings in Cause No. C-13662 *discharged* and the *record expunged upon his successful completion of the probation period.* By this code provision, when Petitioner fulfilled the terms and conditions of the probation order, he was no longer subject to any sentence or any punishment of any kind. Even when a sentence has been imposed, the power of the Court to enforce said original sentence ceases when the probation period has been successfully completed.

The *Maisel* case still stands as the law. It was decided under Sections 724 and 725, U. S. C. A., Title 18, which was the probation code, and which is practically the same under the present provisions of Sections 3651 and 3653. In the *Maisel* case the imposition of sentence was suspended for a period of two years. In the present *Tanzer* case, in Cause No. C-13662, there was no sentence im-

posed. There was only a probation order placing the Petitioner on probation for a period of three years. [See Tr. of R. p. 24.] *Since there was not even a sentence originally imposed, there certainly exists all the more reason to discharge the proceedings and to expunge the record.*

Expunging the record in this case, and thereby permitting the District Court to treat the Petitioner in Cause No. C-17345 as a first offender, would even be in harmony with the intention of Congress in passing the second offender legislation. Confinement in the penitentiary for a period of ten years, without hope of parole or probation, is so harsh a future which certainly was not contemplated by Congress to be applied in the case of a user of narcotics. Certainly such a dark and hopeless future was meant for the trafficker in narcotics.

> ". . . It (drug addiction) is a symptom of a mental or psychiatric disorder. Because contact with a drug is an essential prerequisite to addiction, the elimination of drug servility on the part of addicted persons can best be accomplished *by the removal from society of the illicit trafficker.* It is to this end that your committee has taken favorable action on H.R. 11619." (This is the preliminary House Report on Sec. 7237, U. S. C. A., Title 26.) (Remarks in parenthesis ours.) (Italics ours.)

United States Code Congressional and Administrative News—84th Cong., 2d Sess., 1956, Vol. 2, p. 3281.

> ". . . Under your committee's bill there would be a prohibition on the granting of probations, suspension

of sentence, or parole with respect to any of the *increased penalties applicable to traffickers.*" (Italics ours.)

Same volume as above, p. 3284.

". . . Therefore, it is the view of your committee that the first-offender-peddler problem will become progressively worse and eventually lead to the large scale recruiting of our youth by the upper echelon of traffickers unless immediate action is taken *to prohibit parole, probation, or suspension of sentence in the case of all persons convicted of trafficking in narcotic and marihuana drugs.*" (Italics ours.)

Same volume as above, p. 3285.

". . . There are few criminal acts that are more reprehensible than the act of abetting drug addiction *by engaging in the illicit narcotic and marihuana traffic.*" (Italics ours.)

Same volume as above, p. 3285.

"It is the view of your committee that the illicit drug trafficker, whether he be a first offender or an offender with previous convictions, must be severely punished. The illicit traffic can only be eradicated by the establishment of laws by the Congress that will enable enforcement officials to effectively and vigilantly work to apprehend the trafficker and that will enable the courts to justly impose sentences that are commensurate with the horrendous nature of the offense involved."

Same volume as above, p. 3285.

"3. Penalties.—It is statistically demonstrable that the illicit drug traffic continues to flourish in those problem areas where leniency with respect to sentencing of convicted traffickers is an established pattern in the courts. Effective control of the vicious drug traffic requires not only vigorous enforcement but also certainty of punishment."

Same volume as above, p. 3283.

In the opinion of the Congressional Committee working on Section 7237, U. S. C. A., Title 26, the most important aid that the United States Government can give to the narcotics user is the eradication of the illicit drug traffic.

"The most important contribution that the Federal Government can make to the achievement of this end is the suppression of the illicit drug traffic. *It is your committee's view that H.R. 11619 'll provide salutary results in the relentless drive to remove the trafficker from our society.*" (Italics ours.)

Same volume as above, p. 3286.

"III. Conclusion.

Experience with the Boggs law, Public Law 255 of the 82nd Congress, since its enactment on November 2, 1951, has clearly demonstrated the efficacy of severe punishment in reducing the illicit commerce in drugs."

Same volume as above, p. 3286.

Confining an alleged user of narcotics for ten years in a penitentiary would be treatment of the most barbaric

kind and not at all in accord with the intent of Congress, and not at all in accord with the principles of American justice.

Discharging the proceedings and clearing the record of one who has satisfactorily completed a probation period is in harmony with social justice all over the world. This procedure is followed in many European countries. (*United States v. Maisel*, 26 F. 2d p. 276.) Discharging the proceedings and expunging the record of one who has successfully completed the probation period, and even of those who have already served a prison sentence, is followed successfully even in Russia where hope and individual dignity are of the lowest standing.

Judge Leibowitz of New York, a noted and respected jurist who recently made a study of Russian criminal law and its application, writes as follows in Life Magazine of June 8, 1959, page 160:

> "When he finally leaves prison he is prepared financially, educationally and psychologically to become a useful citizen."
>
> "That last is further encouraged by the Russian custom in many cases of expunging a man's criminal record, once he has served his time. His past mistakes are simply forgotten. Such a man need never admit to any future employer that he is an ex-convict. His criminal record is washed out of his life."
>
> "The contrast with our own prison situation is striking."

Surely the rehabilitation of a user of narcotics cannot be accomplished by such strict confinement as is contemplated by the enhanced punishment statutes.

The *Petitioner is entitled to all of the benefits of the strict construction* of the *enhanced punishment statutes.* Therefore, within the purview of said statute he stands as only a first offender because upon the fulfillment of the conditions of his probation he became entitled to the discharge of the proceedings in Cause No. C-13662, and was no longer subject to punishment or to the jurisdiction of the Court for any purpose.

In this particular case the application of the law in this manner would accomplish the salutary effect that the criminal law intends through the means of probation and would carry out within the law the intent and desires of the District Court, and would be for the benefit of the Petitioner, and in accord with social justice.

Since the Petitioner's liability to any fine or punishment was discharged by the fulfillment of the terms and conditions of probation the Court has inherent power to discharge the record at any time.

From said Section 3651, U. S. C. A., Title 18, it does not appear that the Petitioner must request such discharge. Therefore, the *discharge* of the *proceedings becomes a pure ministerial act which may be performed by the Court at any time before the commitment of the Petitioner in Cause No. C-17345,* for after commitment it would be a useless act and the Petitioner would be put to the necessity of presenting a petition for writ of habeas corpus pursuant to Section 2255, U. S. C. A., Title 28.

It is Petitioner's contention that the enhanced punishment statute, Section 7237, U. S. C. A., Title 26, does not apply to him, in that he is not a second offender because in Cause No. C-13662 there was not a final judgment of conviction.

In Cause No. C-13662, the *District Court suspended the imposition of sentence and placed Petitioner on probation for a period of three years. The Court did not merely suspend the execution of sentence. This, therefore, is not such a final judgment of conviction as to make the Petitioner subject to the application of the second and subsequent offender statute.*

The District Court could have suspended the *execution* of sentence, but the Court made his choice and suspended the actual *imposition* of sentence. This was not a final disposition of the matter. For example, in the case of revocation of probation, when the *execution* of sentence is suspended, the defendant would automatically serve the sentence imposed, merely the execution of which was suspended. But in the case of the *suspension* of sentence, the defendant would have to appear before the Court to then, after the revocation of probation, receive a sentence. This sentence could at that time be for an entirely different term than was the probation period. Therefore, there would not have been a final disposition of the matter.

Even if the *difference between the suspension of the imposition of sentence* and the *suspension of the execution of sentence is only slight, the Petitioner is entitled to whatever benefit* even that technical difference might be before the harsh application to him of the second and subsequent offender statute.

The enhanced punishment statutes are strictly construed in favor of the defendant in a criminal action, and Petitioner is entitled to the benefit of every defect or loop-hole in a prior criminal conviction or action, which

can possibly be used to avoid the application of the second and subsequent offender statute.

> "Statutes providing for additional penalties for habitual offenders are penal and must be strictly construed."
>
> Wharton's Criminal Law & Procedure, Vol. 5, Sec. 2218, p. 436.

The difference between suspension of imposition of sentence and suspension of execution of sentence must be meaningful and substantial because the United States Probation Code provides for a choice by the trial court of either of the procedures.

> ". . . any court . . . *may suspend the imposition or execution of sentence* and place the defendant on probation for such period and upon such terms and conditions as the court deems best." (Emphasis ours.)
>
> Title 18, U. S. C. A., Sec. 3651.

That Congress intended the District Court to have this choice is recognized by many of the cases.

> "Provision of probation act authorizing trial court to suspend imposition or execution of sentence, and to place defendant on probation discloses congressional intent to confer upon Court a choice between imposing sentence before probation is granted or after probation is revoked."
>
> *Roberts v. United States*, 320 U. S. 264.

The District Court in *Tanzer* Cause No. C-13002 was convinced that Petitioner was not a trafficker in narcotics and that he would successfully complete his term of pro-

bation and that the Court would never have to sentence him, and undoubtedly for this reason *suspended the imposition of sentence.* Therefore, in case of the slim chance that the Petitioner would not successfully complete his probation period, the *Court would at that later time impose a sentence.* The *District Court* followed said Section 3651 and *made the choice of suspending the imposition of sentence.* The Petitioner is entitled, by reason of the said construction in his favor of the second and subsequent offender statute, to the benefit of the Court's choice in Cause No. C-13662 not to make a final disposition of said case. *The Court meant not to render final judgment by suspending the imposition of sentence in Cause No. C-13662, and Petitioner is entitled to the benefit of the District Court's choice so that under Section 7237, U. S. C. A., Title 26, there is no prior conviction.*

Suspension of the imposition of sentence in Cause No. C-13662 is not a final judgment of conviction within the meaning of the second and subsequent offender statute. Therefore, Petitioner is not subject to punishment under Section 7237, U. S. C. A., Title 26, in Cause No. C-17345. This represents the majority view.

"The courts in a number of cases construing statutes providing for enhanced punishment where defendant has been convicted two or more times have enunciated the principle that a conviction implies a final judgment *or sentence as distinguished from situations, such, for example, as when sentence was suspended,* no sentence imposed, or an appeal taken." (Italics ours.)

Wharton's Criminal Law & Procedure, Vol. 5, Sec. 2219, p. 437;

5 A. L. R. 2d 1085.

"There must be a pronouncement of *sentence upon the verdict or plea of guilty in order to obtain a judgment that is final, so far as the trial court is concerned.*" (Italics ours.)

Wharton's Criminal Law & Procedure, Vol. 5, Sec. 2219, p. 437.

"Although there is some difference of opinion some Courts take the view that in the absence of a statute specifically covering the matter, a conviction followed by a suspended sentence or the placing of defendant on probation *does not have the essential finality necessary to render it available to enchanced penalty under statutes providing for increased penalty for subsequent convictions or offenses.*" (Italics ours.)

Wharton's Criminal Law & Procedure, Vol. 5, Sec. 2219, p. 437.

"Generally, in federal courts a 'conviction' from which disabilities flow *refers to a conviction which is followed by imposition of a sentence* and which is the judgment in a criminal case, and where imposition of sentence is stayed there is no final judgment." (Italics ours.)

In re Ringnalda, 48 Fed. Supp. 975, Headnote 6, p. 977.

In the above *Ringnalda* case it appears that California had adopted the "expunging of the penalty statute." In that case *Ringnalda* sought citizenship, the greatest privilege in the world today to which one may aspire. The applicant should be without a blemish on his record. The applicant for citizenship doesn't have the cloak of protection that is put on a defendant in a criminal case. Yet in

the *Ringnalda* case the Court held that the suspension of the imposition of sentence and placing of the defendant on probation and the satisfactory completion of the probation wipes out the record of criminality. The Court held that expunging the record removed the stain from the defendant's character. He stood much in the same position as one pardoned. [P. 976; 2-4.] If for the application of citizenship, suspension of the imposition of sentence was not a final judgment, certainly the holding should be the same in case of the application of the harsh statute provided for enhanced punishment.

> "A statute providing for severe punishment of conviction for second offense is highly penal and must be strictly construed. . . . Consequently, it has generally been observed that a 'conviction' within the meaning of the habitual criminal statutes imports the element of finality with respect to the judgment or sentence."
>
> *Gonzales v. United States*, 224 F. 2d 431 at 435 (1st Cir., Puerto Rico).

In a special concurring opinion Chief Justice McGruder says in the above case (p. 437):

> ". . . I do not dissent from the court's conclusion especially in view of the provision of *Rule 32(b) of the Federal Rules of Criminal Procedure that a 'judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence.'*" (Emphasis ours.)

We bring to the Court's attention that Rule 32(b) reads: "adjudication and sentence," indicating clearly that judgment upon a plea of guilty without a sentence following is insufficient to meet the requisition of the rule.

". . . because there can be no conviction until plea or verdict of guilty is followed by judgment and SENTENCE." (Emphasis ours.)

Schooley v. United States, 4 F. 2d 767 at 769 (8th Cir., Ark.).

"In construing many of the statutes enhancing the penalty for a second or subsequent offense, the courts have held a previous conviction to be essential."

58 A. L. R. 40.

"While in common parlance a verdict of guilty is said to be a conviction, it must be given its *strict legal meaning when a second offense is made a distinct crime, carrying with it heavier penalties.* The authorities overwhelmingly establish, first, that in the legal sense a conviction is a judgment on a plea or verdict of guilty; second, a second offense, carrying with it a more severe sentence, cannot be committed in law until there has been a judgment on the first. . . ." (Italics ours.)

Singer v. United States, 278 Fed. 415 at 420.

The words "carrying with it heavier penalties" implies that there must have been a prior penalty. The suspension of the imposition of a sentence cannot possibly come within the purview of a prior penalty.

"It is generally held that, in order that a prior conviction may constitute an element for the enhancement of punishment on a charge of a second or subsequent offense, it must have been a final conviction, in that, *where sentence is suspended* or the conviction is reversed on appeal, *it is not a final con-*

viction within the meaning of the statute." (Italics ours.)

82 A. L. R. 360.

"A statute providing for a severe punishment or conviction of a second or subsequent offense must be strictly construed, being highly penal."

116 A. L. R. 216;

132 A. L. R. 95.

"Applying the rule that, in order that a prior conviction may constitute an element for the enhancement of the punishment on the charge of a second or subsequent offense, it must have been a final conviction, *a suspended sentence was held not to afford a proper basis for a fourth offender* conviction." (Italics ours.)

116 A. L. R. 222;

139 A. L. R. 681 (conviction followed by suspended sentence did not constitute a conviction within the meaning of enhanced punishment statute; b. Finality of conviction).

"Enhanced penalty statutes, being reformatory and harsh in nature, must be strictly construed in keeping with the purpose and intention which the legislature had in mind in passing them."

139 A. L. R. 675.

American Law Reports, after making an exhaustive study of what constitutes a final judgment of conviction within the purview of the enhanced punishment statutes, summarizes the law in 5 A. L. R. 2d 1083, to be that in the majority of jurisdictions the *imposition of a sentence is necessary to constitute a conviction within the meaning*

of the enhanced punishment statutes, and that a suspended sentence does not meet the test of finality of judgment.

> "The central idea or principle borne out by the majority of the cases—by categorical statement in some and by necessary implication in others—is that a conviction within the meaning of the habitual criminal statutes construed herein imports the element of finality with respect to the judgment or sentence."
>
> 5 A. L. R. 2d 1083.

> "More specifically, it will be noted that, except where modified by the terms of some particular statute, *the general view seems to be that a suspended sentence cannot be utilized as a 'conviction' within the meaning of a statute enhancing the penalty for a second or subsequent conviction.*" (Italics ours.)
>
> 5 A. L. R. 2d 1083.

The District Court has indicated his desire not to impose a sentence of ten years' imprisonment on Petitioner without rights to parole or probation; but is of the erroneous opinion that there was a final judgment of conviction in Cause No. C-13062, and erroneously believes that pursuant to Title 26, U. S. C. A., Section 7237, he must impose a sentence upon Petitioner as a second offender.

We have pointed out to this Court that the weight of authority in this country is that a suspended sentence does not have that finality of judgment to constitute a prior conviction within the scope of the enhanced punishment statutes. In case at bar no sentence was imposed, only a probation order made.

The Court's erroneous belief is based upon the decision in *Korematsu v. United States*, 319 U. S. 432-436,

arising out of this Circuit. However, the *Korematsu* case does not apply to the case at bar because it decides only the single point that a probation order without final sentence has finality of judgment requisite for purpose of appeal. That decision gave the defendant in a criminal action a right, to-wit: the right of appeal. It did not deprive the defendant of substantial rights, such as in this case, the right to be sentenced as a first offender, the right to parole, and the right to probation. *What is a requirement for appeal is no guide as to what is the requirement to come within the scope of the enhanced punishment statutes.*

Long ago a second and subsequent offender statute under the prohibition laws, came before this Circuit for interpretation in two instances: (1) *United States v. Olivito*, 67 F. 2d 564, in which this Circuit determined that the prior convictions were too remote and were in a city court; (2) *Haugstead v. United States*, 68 F. 2d 148, in which "habitual violator" was distinguished from "prior conviction." Otherwise, this Circuit has never determined whether or not a suspended sentence or probation order without a sentence is a final judgment of conviction within the meaning of Section 7237 U. S. C. A., Title 26, or any other enhanced punishment statute.

Many circuits even for purposes of appeal make the distinction between the suspension of the imposition of sentence and the suspension of the execution of sentence, and hold that there is no final judgment when imposition of sentence has been suspended.

Birnbaum v. United States, 107 F. 2d 885;

Berman v. United States, 302 U. S. 211; and the cases from various circuits cited in the two above leading cases.

Section 7237, U. S. C. A., Title 26, is a striking departure from the prevailing case law prior to its enactment, and is in derogation of the common law. It is a penal statute so harsh in nature that it not only imprisons the Petitioner as second offender, but deprives him of parole and probation rights. It can be applied only to situations strictly within its letter and spirit. Therefore, it is even more necessary than in cases involving the right to appeal to require the strictest meaning of "final judgment of conviction" before applying said enhanced punishment statute to Petitioner.

Petitioner is asking this Circuit to hold that the *suspension of the imposition of sentence and the entering of a probation order in a prior criminal case does not have the finality of judgment required for the application as to him of the second and subsequent offender statute.* Such a holding would be in line with the majority of the circuit and other federal courts. This would establish a guide for the District Court as to what is a prior final judgment of conviction in regard to the enhanced punishment statute, and it could then, pursuant to Rule 35 of Federal Rules of Criminal Procedure, 18 U. S. C., set aside the sentence imposed upon Petitioner in Cause No. 17345, and sentence him as a first offender subject to rights of probation and parole. Such a holding would give due and proper protection to the Petitioner under the enhanced punishment statute.

Even if this Court should feel that from the face of the code print of the statute it must treat users (possession only) and traffickers alike, such a holding would prevent the axe from falling with the same sharpness on the sick user as on the horrible trafficker.

It is, therefore, by reason of all the matters and things aforesaid patent on its face that the *Court erred in deny-*

ing Petitioner's amended motions because sentence, pursuant to Section 7237, U. S. C. A., Title 26, in Cause No. C-17345 should be set aside because it is illegal in that:

(1) Upon *compliance* with all the terms and conditions of the probation order in Cause No. C-13662, Petitioner was entitled to a *discharge* of the *proceedings* and an *expunging of the record*, and therefore, *he is to be treated as a first offender.*

(2) *Suspending the imposition of sentence and issuing a probation order is not that finality of judgment to sustain the "prior conviction" required by the strict construction of the enhanced punishment statute*, and *Petitioner is entitled to the benefits of strict construction in his favor.*

(3) Since the Petitioner does not come within the strict requirements of the enhanced punishment statute, the sentence imposed is as to the Petitioner without due process of law and is as to him cruel and unusual punishment, violative of Amendments 5 and 8 respectively, of the Constitution of the United States.

Congress, as has been pointed out, no doubt intended the rigors of the enhanced punishment statute to fall on the trafficker.

The District Court is convinced that Petitioner is not a trafficker in narcotics. The District Court does not wish to impose a ten year sentence on Petitioner, and does not wish to deprive him of probation and parole rights, but erroneously believes under the *Korematsu* case that he must treat Petitioner as a second offender. The *Korematsu* case applies only as to what constitutes a final judgment for purposes of appeal.

This Circuit has not passed on what is meant by finality of judgment for purposes of the second and subsequent offender statute. A holding by this Circuit that suspension of the imposition of sentence, or not imposing a sentence at all, and the entering of a probation order, is not such a *final* judgment as to be a prior conviction within the meaning of the enhanced punishment statute, would be consistent with good law and social justice.

The United States Supreme Court has not fully and completely passed on what is meant by *finality*.

Conclusion.

Wherefore, and for the reasons herein stated, Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued, and justice done in the premises.

Respectfully submitted,

SILVER, SILVER & ETTINGER,

By JAMES J. SILVER,

Attorneys for Petitioner.

APPENDIX A.

Constitutional Provisions and Statutes Involved.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Title 18, United States Code, Section 3231:

"The District Courts of the United States shall have original jurisdiction, exclusive of the Courts of the States, of all offenses against the laws of the United States."

Title 21, United States Code, Section 174:

"Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures. It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide

for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported."

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivison, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes."

Title 28, United States Code, Section 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28, United States Code, Section 1294:

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district . . ."

Title 26, United States Code, Section 7237:

Penalties applicable to certain taxes

"(a) Sale or other transfer without [illegible]

—Whoever commits an offense or conspires to commit an offense described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000 . . .

"(c) Conviction of second or subsequent offense

(1) Prior offenses counted. For purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in

(A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C., sec. 174); . . .

(2) Procedure after conviction . . . the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense . . . if he acknowledges that he is such person, he shall be sentenced as prescribed in subsection (a) or (b) of this section, subsection (c) or (h) of such section 2, or such Act of July 11, 1941, as amended, as the case may be."

"(d) No suspension of sentence; no probation, etc.—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

"(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply."

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Melvin Tanzer, Appellant, vs. United States of America, Appellee. No. 16,425.

April 13, 1960.

Upon Appeal from the United States District Court for the District of Arizona.

Before: Orr, Jertberg and Merrill, Circuit Judges.

Merrill, Circuit Judge:

For violation of the Narcotic Drugs Import and Export Act, 21 U. S. C. §174, the minimum sentence for a first offender is five years and that for a second offender is ten years. Since 1956, neither probation nor parole is available. 26 U. S. C. § 7237(d).

In 1952, Tanzer pleaded guilty to a violation of § 174.[1] The imposition of sentence was suspended. He was placed on probation and successfully fulfilled the probation terms. In 1957, Tanzer, after trial, was found guilty of a second violation of the section.[2] The question raised by this appeal is whether, considering the manner of disposition of the first violation, Tanzer is to be regarded as a second offender. The trial court so regarded him and sentenced him accordingly.

Tanzer sought to avoid this consequence in two ways: (1) He moved in the 1952 case for an order setting aside the judgment of conviction upon the ground that the probation terms had been satisfactorily fulfilled. (2)

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[1] On concealing, receiving and facilitating the transportation and concealment of 50 grams of opium.

[2] For importing 30.2 grams of heroin.

He moved in the 1957 case to set aside the order of conviction as a second offender upon the ground that, since imposition of sentence had been suspended in the earlier case, there had been no *final* judgment of conviction in that case. Both motions were denied. Appeals were taken from both orders of denial and have been consolidated for our consideration.

We look first to the appeal from the order in the 1952 case. The question presented is whether, upon successful completion of probation, the defendant is entitled to an order setting aside the conviction.

Appellant relies upon that provision of 18 U. S. C. § 3651, to the effect that "defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation." He contends that this should be read to provide an automatic setting aside and expunging of the conviction.

Satisfaction of judgment is quite different in its significance from forgiveness of the offense. Satisfaction may be had by serving of sentence or, under the quoted language, by fulfillment of the terms of probation. Society, in many respects, however, has seen fit to render significant the fact of conviction of a felony and to attach the attributes of status to a convicted felony.[3] The Federal Youth Corrections Act does provide for automatic setting aside of the conviction upon unconditional discharge of the offender before expiration of his maximum sentence. 18 U. S. C. § 1501. In the absence of express provision to such effect, we cannot read an

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[3] See Notes, Habitual Criminal Statutes, The Requirement of Prior Convictions, 51 Harv. L. Rev. 343 (1937); Court Treatment of Federal Recidivist Statutes, 48 Columbia L. Rev. 238 (1948).

matic forgiveness from a provision for satisfaction.[4] There is no record of congressional intent to achieve such a result. Further, a consideration of the policies underlying such statutes as this[5] would indicate that discharge from surveillance and termination of jurisdiction by ending the proceeding are not inconsistent with the use of the conviction in a prosecution for a subsequent offense. See Model Penal Code, § 301.5, comment (Tentative Draft No. 2, 1954) and Footnote 6.

Nor do we feel that the courts have discretionary power to set aside the conviction in cases such as this. While some states have given their courts such power,[6] no such authority has been conferred upon the federal courts by Congress as to adult offenders. The power in effect to pardon the offense notwithstanding the fact of guilt is not such a power as is inherent in the judicial process. If it is to be exercised by the courts, it should be expressly conferred by legislative act.

The order denying the motion to set aside conviction in the 1952 case is affirmed.

We turn to the appeal from the order denying the motion to set aside conviction as a second offender in the

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[4] In this regard, appellant has relied upon United States v. Maisel, 10 S.D. Texas, 1928, 26 F. 2d 275, to the effect that successful fulfillment of probation eradicates the record of conviction. For the reasons stated in our opinion, we must respectfully disagree with that holding.

[5] As to probation and suspension of sentence, see Burns v. United States, 1932, 287 U. S. 216, 220; United States v. Murray, 1928, 275 U. S. 347, 357, 358; 2 Attorney General's Survey of Release Procedures, pages 138, 139. As to recidivist statutes, see Gonzalez vs. United States, 1 Cir., 1955, 244 F. 2d 431 and authorities there cited.

[6] E. g., California Penal Code, §1203.4; Nevada, [illegible] Stat. 1957, 340. It may be noted that, while these statutes provide for the expunging of convictions upon successful completion of probation, they do expressly make such expunged convictions available in subsequent prosecutions.

1957 case. The question involved is whether the action taken by the court in the 1952 case can be said to amount to a "conviction." Appellant contends that, since imposition of sentence was suspended and probation granted, the action taken cannot be said to have that degree of finality which is necessary to a judgment of conviction.

It is the fact of conviction with which we are concerned. The provision for second offenders (26 U. S. C. § 7237(c)) states that an offender shall be considered a second or subsequent offender "if he previously has been convicted" of the specified offense. Appellant contends that "conviction" contemplates and must include sentence. This proposition has been rejected in United States vs. Rivera, 2 Cir., 1955, 224 F. 2d 88, 89, where it was stated:

"Under the wording of 21 U. S. C. § 174 the crucial facts which make this defendant a multiple offender are his three valid convictions. The sentences imposed for these convictions are of 'no significance', so that even if the defendant's first sentence had been corrected so as to be wholly suspended, the ten-year sentence provided by the statute would still have been mandatory. The language of the statute is too plain to admit of doubt * * *."

Appellant draws a distinction between a suspension of the imposition of sentence and a suspension of the execution of sentence. In the latter case, he concedes that judgment has been rendered. In the former case, however he contends that judgment has been reserved.

This distinction has been rejected by the Supreme Court, in Korematsu vs. United States, 1943, 319 U. S. 432, which found the difference to be "one of trifling degree" (page 435). The court held conviction to be a

final judgment, notwithstanding suspension of imposition of sentence." The court stated (pages 434-435):

"The 'sentence is judgment' phrase has been used by this Court in dealing with cases in which the action of the trial court did not in fact subject the defendant to any form of judicial control.* * * Here litigation 'on the merits' of the charge against the defendant has not only ended in a determination of guilt, but it has been followed by the institution of the disciplinary measures which the court has determined to be necessary for the protection of the public."

Appellant would distinguish this case upon the ground that the question there was as to the finality of the judgment for purposes of appeal. He points out that the decision of the court there favored the appellant.

The fact remains, however, that the distinction between imposition and execution of sentence is a somewhat technical foundation upon which to base one's freedom from the taint of the offense. If there be merit in the proposition that a successful probationer should not be regarded as a prior offender under the statute, the merit certainly extends to both forms of suspension.[7]

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[7]See Model Penal Code, §301.6 (Tentative Draft No. 2, 1954). A majority of state jurisdictions which have passed upon the problem hold that the form of sentence does not affect the finality of the judgment. Winn vs. Commonwealth, Ky. Ct. App., 1957, 303 S. W. 2d 275; State vs. McCall, 1953, 27 N. J. S. 157, 99 A. 2d 153, 161; People vs. Funk, 1948, 321 Mich. 617, 33 N. W. 2d 95; People vs. Rave, 1936, 346 Ill. 72, 3 N. E. 2d 972; cf. State vs. O'Dell, 1950, 71 Idaho 64, 225 P. 2d 1020; although Ex Parte Farr, 1948, 87 Okla. Crim. R. 411, 198 P. 2d 748, and State vs. Olson, 1925, 200 Iowa 660, 204 N. W. 278, holding finality, dealt specifically with suspension of the execution of the sentence. It is significant to note that no jurisdiction holds that a different result obtains when suspension of the imposition is involved.

Appellant emphasizes the harshness of the provisions of § 7237 relating to second offenders who are not traffickers. There can be no doubt of this; nor can there be doubt that harshness was intended. Congress apparently was in no lenient mood when the section was enacted. We may note that, had the section existed in its present form at the time of appellant's first conviction, probation would not have been available to him.

Appellant refers to the legislative history of the 1956 amendment of § 7237 and draws our attention to the emphasis laid upon trafficking in drugs as distinguished from personal use. Subparagraph (b) of the section, in one respect, has dealt expressly with those who traffic with persons under the age of eighteen years. In the balance of the section, no such distinction has been made, and the failure to distinguish, under the circumstances, must be held to have been intentional.[5] With respect to

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Of the two jurisdictions holding that sentence does affect the finality, New York has found no distinction between imposition and execution. People vs. Shaw, 1956, 1 N. Y. 2d 30, 133 N. E. 2d 681; People *ex rel.* Lozzi vs. Fay, 1958, 6 App. Div. 2d 18, 175 N. Y. S. 2d 230, affirmed, 1959, 5 N. Y. ... 2d 890, 156 N. E. 2d 462; and Texas gives no indication of observing any difference. Cromeans vs. State, 1954, 160 Tex. Crim. R. 491, 214 S. W. 351.

Appellant has relied upon Gonzalez vs. United States, 1 Cir., 1955, 224 F. 2d 431; Schooley vs. United States, 8 Cir., 1925, 4 F. 2d 707; and Singer vs. United States, 3 Cir., 1922, 278 Fed. 415. These cases are distinguishable in that they involve situations where there had been no pronouncement of judgment by the court on a plea or verdict of guilty.

[5]Furthermore, §7 of the House Report, H. R. 2388, 84th Cong., 2d Sess. (1956) (U. S. Code Cong. & Ad. News, 3270) makes it abundantly clear that, as to subsequent offenders under §174, no distinction is made between traffickers and personal users; as to probation, suspension of sentence or parole under §174, no distinction is made between traffickers and personal users or between first and second offenders. That report states:

"Under the present law probation and suspended sentence are available for first offenders and parole is available to all offenders. The proposed amendment contained in your committee's bill would provide that probation, suspension of sentence, and parole would not be available to any offender."

legislative intent, it was stated in United States vs. Buia, 2 Cir., 1956, 236 F. 2d 548:

"The purpose of Congress in enacting multiple offender penalties in the narcotics laws was to punish violators more severely, to deter the criminal who engages in illicit drug traffic and to take habitual violators out of circulation."

The order denying the motion to set aside the conviction as second offender in the 1957 case is affirmed.

(Endorsed) Opinion Filed April 13, 1960.

FRANK H. SCHMID, CLERK.

APPENDIX C.

United States Court of Appeals for the Ninth Circuit.

Melvin Tanzer, Appellant, vs. United States of America, Appellee. No. 16425.

Judgment.

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
FRANK H. SCHMID, Clerk
Filed and entered: April 13, 1960

COPY

FILED
SEP 7 1960
JAMES R. BROWNING, Clerk

No. 249

In the Supreme Court of the United States

OCTOBER TERM, 1960

MELVIN TANZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

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In the Supreme Court of the United States

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No. 249

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 36-41) is reported at 278 F. 2d 137.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1960 (R. 42). A petition for rehearing was denied on May 31, 1960 (Supp. R. 2). On June 9, 1960, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and includ-

ing July 30, 1960. The petition was filed on July 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether one convicted of a narcotic offense, as to whom imposition of sentence had been suspended, was entitled to have the record of conviction expunged on fulfillment of the terms of probation.

2. Whether a conviction on which imposition of sentence had been suspended is a final judgment so as to constitute a prior conviction under the narcotic laws.

STATUTES INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

26 U.S.C. 7237 (c) provides in pertinent part:

> Conviction of second or subsequent offense.
>
> (1) Prior offenses counted.
>
> For purposes of * * * subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), * * * an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in * * *
>
> (A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C., sec. 174) * * *.
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> * * * *

STATEMENT

In 1952, in the United States District Court for the District of Arizona, the petitioner pleaded guilty to a charge of violating 21 U.S.C. 174 (R. 3-4; 19-23).[1] On January 26, 1953, the district court adjudged that the petitioner "has been convicted upon his plea of Guilty," suspended the imposition of sentence, and placed the petitioner on probation for three years (R. 22-24).

In March, 1957, after the petitioner had fulfilled the terms and conditions of probation, he was convicted, in the same district court after a jury trial, of violating 21 U.S.C. 173-174, in that he imported and assisted in the importation into the United States

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[1] This violation consisted of receiving, concealing and facilitating the transportation of fifty grains of smoking opium (R. 3-4).

of 29½ grains of heroin (R. 7-8). An information was filed setting forth the prior narcotics conviction (R. 7-8). At the sentencing proceeding on March 11, 1957, the petitioner admitted that he was the same person who had been convicted by the district court for a narcotics offense in 1953, and was sentenced to ten years' imprisonment as a second offender under 21 U.S.C. 174 and 26 U.S.C. 7237 (c), *supra*, pp. 2-3 (R. 8-15).

The petitioner moved in the first case to have the record of conviction expunged on the ground that he had satisfactorily fulfilled the terms of probation (R. 4-5). He also moved in the second case to have the sentence set aside on the ground that the first prosecution did not result in a final judgment which would support a subsequent sentence as a second offender (R. 15-19). The district court denied both motions (R. 6, 25). On appeal, the orders of the district court were affirmed. 278 F. 2d 137.

ARGUMENT

1. The petitioner argues that, since he fully satisfied the terms and conditions of probation following his first conviction in 1953, he is entitled to have that conviction expunged and set aside pursuant to the probation statute, 18 U.S.C. 3651 (Pet. 11-14, 17-18). He relies upon that part of the statute which provides that:

> The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

This language does not, however, mean that, once the terms and conditions of probation are satisfied, automatic expungement of the conviction follows so that the prior conviction may not be considered in determining status as a second offender. It means nothing more than that a defendant who has satisfactorily completed his probationary period may not thereafter be subjected to a fine or other punishment for the offense upon which the probation was based. As the Revisor's Notes to 18 U.S.C. 3651 make plain, the purpose of the language was to insure "certainty as to the extent of defendant's liability * * *."[2] As the court below pointed out, 18 U.S.C. 3651 is not a pardon statute (278 F. 2d at 139). Cf. *United States* v. *Murray*, 275 U.S. 347, 357; *Affronti* v. *United States*, 350 U.S. 79, 83.[3]

2. The petitioner argues that, in any event, the suspension of imposition of sentence in the first pros-

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[2] Some states, such as California, do provide that, on satisfaction of the terms of probation, the defendant may have the conviction expunged, although the California statute itself provides that the conviction remains effective as a prior offense in a subsequent prosecution (Cal. Penal Code 1203.1). The federal statute does not follow that pattern. The petitioner's reliance on *In re Ringnalda*, 18 F. Supp. 975 (S.D. Cal.), involving the effect of the California statute, is therefore misplaced.

[3] The decision in *United States* v. *Mosel*, 26 F. 2d 275 (S.D. Texas), handed down soon after the probation statute was enacted, does contain broad language that satisfactory fulfillment of the terms of probation warrants full discharge of the proceedings, and, where sentence has been suspended, results in no judgment. However, as discussed in Point 2 of the text, it is now clear that suspending imposition of a sentence is itself a judgment on a conviction.

ecution is not a final judgment for the purpose of sentencing him as a second offender. He draws a distinction between the suspension of the imposition of sentence and suspension of the execution of sentence, arguing that the latter represents a final judgment but the former does not. This distinction was rejected in *Korematsu* v. *United States*, 319 U.S. 432, 435, the Court there noting that it was "one of trifling degree," and deciding that in either circumstance there was finality of adjudication.

The first proceeding resulted in a final adjudication of guilt; the petitioner could not again have been tried for that offense. This is simply a case where, after conviction of the first offense, the trial court imposed the "mild and ambulatory punishment" of probation. See *Korematsu* v. *United States*, 319 U.S. 432, 435. That the punishment was mild does not alter the fact that there was a complete and final judicial determination—a judgment—that the petitioner had violated the narcotic laws. After the period of mild punishment had ended, the petitioner was convicted of another offense in violation of the federal narcotic laws.[4] He is therefore a second of-

[4] *Singer* v. *United States*, 278 Fed. 415 (C.A. 3), certiorari denied, 258 U.S. 620, and *Gonzalez* v. *United States*, 221 F. 2d 431 (C.A. 1), relied upon by the petitioner, involved the totally different situations in which the subsequent offender statute was sought to be employed where the commission of the subsequent offense occurred before judgment was rendered on the first offense. Also inapposite is *Schooley* v. *United States*, 4 F. 2d 767 (C.A. 8), which essentially turned on the fact that the first offense was insufficiently pleaded in the indictment charging the subsequent offense.

fender and, as such, is subject to the greater punishment specifically required by Congress in 21 U.S.C. 174 and 26 U.S.C. 7237(c).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] The petitioner further contends that, since he was a user, rather than a trafficker of narcotics, the second offender provisions were not meant to apply to him. The petitioner was convicted under 21 U.S.C. 174 for having brought heroin in across the Mexican border. The statute draws no such distinction as he urges.

☆ [illegible] 1960 [illegible]